

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

OMAR AVILA

Claimant

V.

MITESH CONSTRUCTION, INC.

Respondent

AND

OWNERS INSURANCE COMPANY

Insurance Carrier

Docket No. 1,068,185

ORDER

Respondent and insurance carrier (respondent), through Matthew M. Hogan, of Overland Park, request review of Administrative Law Judge Thomas Klein's April 24, 2015 Order. Terry J. Torline, of Wichita, appeared for respondent. W. Walter Craig, of Derby, appeared for claimant.

The record on appeal is the same as that considered by the judge and consists of the June 10, 2014 and April 14, 2015 preliminary hearing transcripts, in addition to all pleadings contained in the administrative file.

ISSUES

Following an April 14, 2015 hearing, the judge denied respondent's request to dismiss this claim.

Respondent argues the judge failed to follow his statutory duty to render a decision on compensability and act impartially. Respondent also argues the judge failed to deny benefits following claimant's failure to prove compensability. Respondent asserts claimant brought his case against the wrong employer. Claimant maintains the Order should be affirmed and argues respondent presented no evidence to refute compensability. Claimant argues the Board lacks jurisdiction to hear respondent's appeal.

The issues for Board review are:

1. Does the Board have jurisdiction to consider respondent's appeal?
2. Was claimant respondent's employee?
3. Did the judge exceed his jurisdiction in issuing his Order?

FINDINGS OF FACT

Claimant alleged injuries occurring between December 27 and 30, 2013. He filed his application for hearing on January 8, 2014. A February 20, 2014 preliminary hearing Order awarded claimant medical treatment and temporary total disability (TTD) benefits.

On April 21, 2014, claimant was incarcerated and was unable to attend his medical appointments. According to claimant's counsel, claimant was deported to Mexico on or about May 20, 2014, and has not returned to the United States.

Following a June 10, 2014 preliminary hearing, the judge suspended claimant's TTD benefits. Thereafter, respondent scheduled a prehearing settlement conference and wanted the case cleared for regular hearing dates, but the judge declined such request in a February 23, 2015 Order. Respondent requested Board review.

On March 2, 2015, respondent sent a seven-day notice of intent to claimant's counsel demanding he "immediately dismiss any claim brought by Omar Avila against Mitesh Construction, Inc."¹ Respondent did not request a benefit change. Respondent set the matter for preliminary hearing to take place on April 14, 2015.²

In an April 13, 2015 Order, the Board dismissed the appeal of the judge's interlocutory order for lack of jurisdiction.

Neither party presented any evidence at the April 14, 2015 hearing. Mr. Hogan indicated respondent contested compensability, including that the wrong employer was named as respondent. Mr. Hogan also noted claimant carried the burden of proving compensability. Among other arguments, claimant's attorney stated he was not put on notice that respondent contested whether the correct employer was named as respondent.

On April 24, 2015, the judge issued the following Order:

Respondent requests an Order denying compensability of this claim.

The facts surrounding the basis for the motion are largely the same ones that the court and Workers Compensation Review Board addressed in a June 10, 2014 hearing. The court denies respondent's request to dismiss this claim.³

Thereafter, respondent filed an appeal.

¹ P.H. Trans. (Apr. 14, 2015), Cl. Ex. 1.

² *Id.*, Resp. Ex. 1.

³ ALJ Order (Apr. 24, 2015).

PRINCIPLES OF LAW & ANALYSIS

K.S.A. 2013 Supp. 44-534(a) states:

Whenever the employer, worker, Kansas workers compensation fund or insurance carrier cannot agree upon the worker's right to compensation under the workers compensation act or upon any issue in regard to workers compensation benefits due the injured worker thereunder, the employer, worker, Kansas worker's *[sic]* compensation fund or insurance carrier may apply in writing to the director for a determination of the benefits or compensation due or claimed to be due. The application shall be in the form prescribed by the rules and regulations of the director and shall set forth the substantial and material facts in relation to the claim. Whenever an application is filed under this section, the matter shall be assigned to an administrative law judge. The director shall forthwith mail a certified copy of the application to the adverse party. The administrative law judge shall proceed, upon due and reasonable notice to the parties, which shall not be less than 20 days, to hear all evidence in relation thereto and to make findings concerning the amount of compensation, if any due to the worker.

K.S.A. 2013 Supp. 44-534a states, in part:

(a)(1) After an application for a hearing has been filed pursuant to K.S.A. 44-534, and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total or temporary partial disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.

(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative

law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

After claimant was deported or incarcerated, respondent requested the judge's permission to allow it to schedule a regular hearing. Presumably, respondent's position was that if a regular hearing were held, claimant would fail to appear and respondent would prevail based on a failure of proof. The judge declined respondent's invitation and the Board dismissed respondent's appeal of an interlocutory order.

In an alternative plan, respondent scheduled the instant "preliminary" hearing as a means of getting the claim dismissed. Respondent was operating under the position that claimant bears the burden of proof and loses if he is unavailable to testify.

The judge proceeded as if respondent filed a motion or request to dismiss. The Board will not disturb such order. The judge's denial of respondent's motion or request is an interlocutory order. Because the judge's order denying respondent's motion or request to dismiss is not a final order, but rather is interlocutory in nature, the Board lacks jurisdiction to review the merits of the issue raised by respondent.⁴

⁴ *Nelson v. Wichita Vending*, No. 1,062,842, 2014 WL 6863032 (Kan. WCAB Nov. 4, 2014).

While the hearing was labeled a “preliminary hearing,” it was not a preliminary hearing. “[P]reliminary hearing orders are limited to issues concerning the furnishing of medical treatment, the payment of temporary total disability compensation, or the payment of temporary partial disability compensation.”⁵ The purported preliminary hearing did not concern temporary disability benefits or medical treatment. Respondent sought no benefit change, as is required by K.S.A. 2013 Supp. 44-534a(a)(1). Instead of seeking a change in benefits or contesting medical treatment or temporary disability benefits, respondent’s March 2, 2015 demand letter stated the purpose for the preliminary hearing was to obtain a claim dismissal. Thus, the judge characterized the hearing as one concerning respondent’s motion or request to dismiss.

Even if the hearing arguably concerned a preliminary dispute under K.S.A. 2013 Supp. 44-534a, the judge determined compensability, and impliedly decided claimant was respondent’s employee, by ordering benefits on February 20, 2014. Claimant already met his burden of establishing compensability. Respondent put on no evidence disputing compensability or the purported lack of an employee-employer relationship.

Finally, citing K.S.A. 2013 Supp. 44-534(a), respondent argues the judge shall “hear all evidence” and determine if claimant is entitled to any compensation. Respondent argues the judge “essentially refused to comply” with his “inexcusable burden” to hold a preliminary hearing and decide if any compensation was due to claimant.⁶ The Board views respondent’s argument as alleging the judge exceeded his jurisdiction under K.S.A. 2013 Supp. 44-551(l)(2)(A) by not following a statutory duty. However, K.S.A. 2013 Supp. 44-534(a) states the judge shall hear all evidence after an application for hearing is filed and further states the parties must be given at least 20 days notice prior to a hearing taking place. The statute concerns what practitioners call a regular hearing and does not concern what the judge is to do with respect to any other hearings. The judge did not exceed his jurisdiction when he did follow K.S.A. 2013 Supp. 44-534(a) in deciding something that was not a regular hearing.

When the record reveals a lack of jurisdiction, the Board’s authority extends no further than to dismiss the action.⁷

CONCLUSION

WHEREFORE, the Board dismisses respondent’s appeal.

⁵ *Torres v. Woodmasters, Inc.*, No. 1,058,973, 2012 WL 2061784 (Kan. WCAB May 14, 2012).

⁶ Resp. Appeals Board Brief (filed May 18, 2015) at 3-4.

⁷ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

IT IS SO ORDERED.

Dated this _____ day of June, 2015.

BOARD MEMBER

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